

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

**IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO. 76H-)
30028713 BY PATRICIA SKERGAN AND JIM)
HELMER)**

FINAL ORDER

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307, a hearing was held on June 12, 2008, in Missoula, Montana, to determine whether a beneficial water use permit should be issued to Patricia Skergan and Jim Helmer, hereinafter referred to as "Applicant," for the above application under the criteria set forth in Mont. Code Ann. §85-2-311.

APPEARANCES

Applicant appeared at the hearing by and through counsel, Ross Miller and Donald MacIntyre. Bill Craig was called to testify for the Applicant.

Objector Hayes Creek Homeowners Association appeared at the hearing by and through counsel John Ferguson. Adam Perine, Greg Watkiss and Kathy Cross were called to testify for Objector Hayes Creek Homeowners Association.

Objector Mark and Michel Fullerton appeared at the hearing by and through counsel Richard Buley.

Objector Patricia Gray appeared at the hearing *pro se*.

Objector Greg Watkiss appeared at the hearing *pro se*.

Objector Peter Odegard appeared at the hearing *pro se*.

PRELIMINARY MATTERS

This proposed appropriation is for ground water from an existing well for domestic and lawn and garden uses. The proposed diversion rate is 25 gpm (subsequently clarified to 20 gpm, See Hearing Record, Track 7 @ 50:45) with a requested volume of 3.5 acre-feet per year. The proposed diversion is from an existing well that is permitted for a diversion rate of 20 gpm and an annual volume of 3.5 acre-feet for domestic and lawn and garden uses under provisional

permit 76H-108731, owned by Curtis and Christina Horton. The proposal is to pump the well at 20 gpm for an additional 3.5 acre-feet per year. The applicant provided a copy of a signed shared well agreement with their application.

The proposed diversion is located within the boundaries of the Hayes Creek Controlled Ground Water Area. All proposed uses of ground water within the Hayes Creek Controlled Ground Water Area require an application for beneficial water use permit.

The proposed diversion is also located within the Bitterroot River basin closure, 85-2-344 MCA. An application for a permit to appropriate ground water is an exception to the Bitterroot River basin closure. An application for beneficial water use of ground water is allowed by both the Hayes Creek Controlled Ground Water Area and the Bitterroot River basin closure. Such application is required to comply with the provisions set forth in 85-2-360 MCA and 85-2-361 MCA.

Prior to the hearing in this matter the Hearing Examiner requested briefs from the Applicant and Objectors regarding two issues raised during pre-hearing conference: 1) the applicability of the provisions of the Hayes Creek Controlled Ground Water Area as applied specifically to the pending application, and 2) The Department of Natural Resources and Conservation's (DNRC) granting of the Applicant's request for a variance to the aquifer test requirements of ARM 36.12.121. The Applicant and Objector Hayes Creek Homeowners Association (HCHA) both provided briefs and response briefs and oral argument was held at the beginning of the hearing on this matter regarding those two issues. Only counsel for Applicant and counsel for HCHA participated in oral argument.

Regarding the issue of the applicability of the provisions of the Hayes Creek Controlled Ground Water Area (HCCGA), the counsel for Applicant argue that the Hearing Examiner does not have subject matter jurisdiction to make a ruling on the applicability of the HCCGA, and that the Hearing Examiner's jurisdiction is limited to determinations under 85-2-311 MCA under which the Applicant opted to proceed pursuant to 85-2-508(1) MCA. The crux of the issue at hand is whether the Hearing Examiner can terminate or deny the pending application because it seeks to appropriate additional water from a second well located on the Skergan/Helmer property which objector HCHA alleges to be in violation of the HCCGA Final Order, section B. The clause at issue in section B states "[t]here shall be no more than one well on each lot with lot sizes limited to current local zoning regulations." Objector HCHA argues that the permit for the existing well was issued in violation of the "one well per lot" provision of the HCCGA Final Order rendering it an illegal well and therefore the instant application can not be granted for an

additional water right from this well. Objector HCHA also argues that the Applicant must meet (i.e. prove) the mandatory provisions of the HCCGA Final Order in addition to the criteria in 85-2-311 MCA. Finally, Objector HCHA argues that water is not legally available 85-2-311(1)(a)(ii) MCA because there is already one well on the lot, and it is allegedly in violation of the HCCGA Final Order. The HCCGA Final Order is dated November 30, 1998.

A brief background of the situation is in order. Prior to and at the time the Final Order was issued, the property that the Applicant now owns was designated by Missoula County as C-A1 (open and resource lands). This county zoning restriction provides for a minimum residential density of one dwelling per forty acres. At the time the Final Order was issued, Christopher Cronyn and Susan Rangitsch owned the forty acres that now comprise two lots, one of which is owned by Christina and Curtis Horton and the other by Patricia Skergan and Jim Helmer (Applicant's herein). A well already existed on the Cronyn's lot at the time the Final Order was issued. That well is associated with ground water certificate 76H-98058-00 (Cronyn or Strawbridge well) and serves a residence on a separate twenty acre lot (not part of the 40 acre parcel referenced above) that was originally owned by Christopher Cronyn and Susan Rangitsch and then later sold to the current owner, Michael Strawbridge.

On December 17, 1999, Christopher Cronyn submitted an Application for Beneficial Water Use Permit 76H-108731-00. DNRC issued Permit No. 76H-108731-00 (associated with what is herein referred to as the "Horton well") on April 11, 2000 for 25 gpm and 3.5 acre-feet without public notice and without requiring an aquifer test See 85-2-307(3) MCA (notice).

On May 3, 2000, Christopher Cronyn sold the forty acres to Chris Steiner. Steiner then split the forty acres into two twenty acre parcels via an occasional sale and transferred one of the twenty acre parcels to Brad Steiner. Chris and Brad Steiner then entered into a well share agreement. Chris Steiner then sold his property to Curtis and Christina Horton. Brad Steiner and the Horton's then entered into a well share agreement. Brad Steiner then sold his property to Jim Helmer and Patricia Skergan and another well share agreement was made between the Horton's and Skergan/Helmer.

Thus, the current Skergan/Helmer property (20 acres) has two existing wells. The older well (Strawbridge well), associated with water right 76H-98085-00, serves the Strawbridge residence located on a twenty acre parcel adjacent to and directly east of the Skergan/Helmer property, and the newer well (Horton well), associated with water right 76H-108731-00, which serves the Horton residence located on a twenty acre parcel adjacent and directly west of the Skergan/Helmer property. It is this later well that is the subject of the application currently under

consideration.

This Hearing Examiner concludes that his jurisdiction under the instant application is limited to the criteria enumerated in 85-2-311 MCA and the issue of the HCCGA provisions are not within the scope of his appointment for the following reasons. The “Hearing Notice and Appointment of Hearing Examiner” dated March 20, 2008 specifically states “[t]he issue in this matter is whether the appropriation for which the Applicant has applied meets the required statutory criteria of 85-2-311, MCA.” As noted by the Applicant, the only opportunity for a hearing (on the instant application) is for a hearing on the objections to the permit and the objections must relate to one or more of the criteria in 85-2-311 MCA. If Objector HCHA is aggrieved by the fact that more than one well exists on a lot, the instant proceeding is not the forum for redress.

Objector HCHA’s argument that the Applicant must meet the mandatory provisions of the HCCGA Final Order and the criteria in 85-2-311 MCA is also unavailing. Applicant admits that the criteria found in 85-2-311 MCA must be met and that the burden is on the Applicant to prove those by a preponderance of the evidence. The mandatory provisions of the HCCGA Final Order, however, are not criteria that the Applicant must prove but are simply conditions that necessarily attach to their permit should it be granted. This Hearing Examiner has no jurisdiction to evaluate the conditions of the HCCGA Final Order and whether they have been “met” by the Applicant’s proof – they simply attach to the permit should it be issued.

Finally, Objector HCHA argues that the 85-2-311 MCA criteria of “legal availability” cannot be met because the water produced for the proposed permit is being taken from a well that is allegedly in violation of the HCCGA Final Order. This Hearing Examiner, and the DNRC, have consistently viewed the “legal availability” criteria in terms of the *source* of the water not the appropriation works, in this case the aquifer underlying the Hayes Creek area. *See, e.g. In the Matter of the Application for Beneficial Water Use Permit Number 76LJ-11583100 by Benjamin L. & Laura M. Weidling (DNRC Final Order 2002), affirmed, In the Matter of Application for Beneficial Water Use Permit Nos. 76LJ-1158300 by Benjamin and Laura Wielding and 76LJ-1158300 by Ramona and William Nessly, Cause No. BDV-2003-100, Montana First Judicial District Court (2004).*

Regarding the issue of DNRC granting the variance to the aquifer testing procedures outlined in ARM 36.12.121, this Hearing Examiner finds that the granting of such a variance is a matter outside the scope of the Hearing Examiner’s jurisdiction. The Applicant applied for, and received, a variance from the aquifer testing procedure found in ARM 36.12.121. That section

of the rules lists a “preferred” aquifer testing procedure. The DNRC has, in the past, allowed variances from the “preferred” aquifer testing procedure in many cases, including for wells in the HCCGA. The granting of such a variance is an action taken by the DNRC in the process of making a determination that the application is correct and complete – a process which occurs prior assignment of this contested case to the Hearing Examiner. The Department recently held in a motion to the Director, to the extent an issue is not specifically identified by the Department to be “corrected” or “completed” within the 180 day period under 85-2-302 MCA, the issue is deemed correct and complete by the expiration of the period. *In the Matter of Application for Beneficial Water Use Permit Nos. 41B-30028374 and 41B-30028375 by Sitz Ranch Management Partnership, Order of the Director on Certified Motion* (November 2008).

Prior to the close of the hearing counsel for Objector Fullerton, Richard Buley, moved for a dismissal of the application based on the provisions of 85-2-508(2) MCA and 85-2-311(1)(a)(ii) and/or 311(1)(c) MCA. For the reasons that follow, said motion is **DENIED**.

EXHIBITS

Both Applicant and Objector HCHA offered exhibits at the hearing for the record. The exhibits are admitted into the record to the extent noted below.

Applicant’s Exhibit A1 is the resume of Bill Craig, Tetra Tech Hydrogeologist.

Applicant’s Exhibit A2 is a letter from Bill Schultz, Missoula Regional Manager, DNRC to Ross Miller granting a variance from aquifer testing requirements dated April 27, 2007 along with copies of the request for variance and supporting documentation consisting of 45 pages.

Applicant’s Exhibit A3 is a copy of “Ground Water Conditions at the Hayes Creek Temporary Controlled Ground Water Area” by DNRC dated February 1998 consisting of 42 pages.

Applicant’s Exhibit A4 is a copy of “Hydrogeologic Assessment Report & Criteria Addendum Evaluation” for the Skergan/Helmer Beneficial Use Application, prepared by Tetra Tech, dated November 1, 2007.

Applicant’s Exhibit A5 a copy of an aerial photograph showing a portion of the Hayes Creek Controlled Ground Water Area and the ownership of various lots, dated May 30, 2008.

Applicant’s Exhibit A6 copies of documents from the “Mefford” application file No. 76H-30025195, granted May 17, 2007, consisting of 83 pages.

Applicant’s Exhibit A7 copies of documents from the “Cronyn” application file No. 76H-108731, granted April 11, 2000, consisting of 49 pages.

Applicant's Exhibit A8 a copy of a "Proposal for Hydrogeologic Services" from Geomatrix to Patricia Skergan, dated May 8, 2007, consisting of 9 pages.

Applicant's Exhibit A10 a copy of the objection filed by Patricia and Michael Gray, received by DNRC January 4, 2008, consisting of 10 pages.

Applicant's Exhibit A11 a copy of the objection filed by Mark and Michel Fullerton, received by DNRC January 5, 2008, consisting of 9 pages.

Applicant's Exhibit A12 a copy of the objection filed by Greg Watkiss, received by DNRC on January 5, 2008, consisting of 10 pages.

Applicant's Exhibit A13 a copy of the objection filed by Peter Odegard, received by DNRC January 5, 2008, consisting of 9 pages.

Objector HCHA30 a copy of a "Schematic Cross Section of Skergan/Helmer (sic) and Cronyn Wells, source and date not documented, consisting of 1 page.

Objector HCHA19 a copy of an aerial photograph indicating the location of the Cross, Odegard, Pontrell and Watkiss wells, by Derek Olson, dated June 3, 2008, consisting of 1 page.

Exhibits were also filed with the pleadings in this matter prior to the hearing and are included in the record as attachments to those pleadings.

FINDINGS OF FACT

General

1. Application for Beneficial Water Use Permit No. 76H-30028713 in the name of Patricia Skergan and Jim Helmer was filed with the Department on July 23, 2007. (Department file)
2. Notice of Application No. 76H-30028713 including information about the proposed appropriation and the procedure for filing objections was published in the *Missoulian*, a newspaper of general circulation, on December 6, 2007. The notice was also mailed to persons listed in the Department file on December 4, 2007. (Department file)
3. The Environmental Assessment (EA) prepared by the Department for this Application was reviewed and included in the record of this proceeding. (Department file)
4. Application No. 76H-30028713 seeks to appropriate 20 gallons per minute (gpm) up to 3.5 acre-feet per year from ground water. The proposed means of diversion is from an existing well located in the NE1/4NE1/4NE1/4, Sec. 9, T12N, R20W, Missoula County, Montana. The proposed use is for Domestic use (including lawn and garden). The proposed place of use is for one residential dwelling and 1 acre of lawn and garden located in the E1/2NE1/4NE1/4, Sec. 9, T12N, R20W, Missoula County, Montana. The proposed period of diversion is January 1

through December 31, inclusive, of each year. The applicant states that 1 acre-foot will be needed for domestic use year-round, and 2.5 acre-feet will be needed for lawn & garden use between April 15 and October 15, each year. (Department file, Exhibit A4)

5. The proposed means of diversion is from an existing well which is already permitted for domestic and lawn and garden uses by the Department under Provisional Permit No. 76H-108731 (April 11, 2000) in the amount of 25 gpm and 3.5 acre-feet per year. The subject well is physically located on the Skergan/Helmer property and supplies water under Provisional Permit 76H-108731 to an adjacent property owned by Curtis and Christina Horton. Skergan/Helmer and the Horton's have entered into "Shared Well Ownership" and "Water Well Use and Maintenance" agreements. (Department file, Exhibit A4, Exhibit A2)

6. Applicant does not intend to increase the pumping rate for the existing well (i.e. the 25 gpm currently permitted *plus* their proposed 20 gpm thus totaling 45 gpm) but rather proposes that the pumping rate will remain at 20 gpm (the maximum rate for the currently installed pump in the well for Provisional Permit No.76H-108731) and the pump will run for a longer period of time to provide the volumes of water necessary for the Horton property and the Skergan/Helmer property – a total maximum appropriation from the well of 7 acre-feet per year (3.5 acre-feet maximum for the Horton property and 3.5 acre-feet maximum for the Skergan/Helmer property). (Department file, Hearing Record Track 7 @ 50:45 – 55:30)

Basin Closure

7. Applicant provided a Hydrogeologic Assessment as required by 85-2-361 MCA with their original application. This Hydrogeologic Assessment was deemed inadequate by the Department's hydrogeologist. (Department file)

8. Applicant provided a revised Hydrogeologic Assessment on November 1, 2007. This revised Hydrogeologic Assessment was reviewed by the Department's hydrogeologist and was deemed to "meet[s] the requirements of 85-2-361 MCA." (Department file)

9. The Horton well is drilled to a depth of 120 feet. The bedrock aquifer which supplies water to the well is a fractured crystalline bedrock that has virtually no primary porosity. Ground water movement and storage is principally contained within joints and fractures within the host rock. The only available storage coefficient for this aquifer is 0.004 which suggests confined conditions. (Exhibits A3, A4)

10. Using the same methodology that was used in the approval of Permit No. 76H-30025195 (Mefford 2007) also located in the HCCGA, the Applicant estimates that there will be a total

ground water depletion of 2.08 acre-feet by assuming 1 acre-foot per year domestic use with a consumption of 20% (0.20 acre-feet) plus 2.5 acre-feet per year lawn and garden use with a consumption of 75% (1.88 acre-feet).¹ (Exhibit A4, A6)

11. Again, using the same modeling technique as used in the Mefford Application (the Well Depletion Model developed by Western Water Consulting, Inc.), the Hydrogeologic Assessment estimates a theoretical *potential stream* depletion of 1.31 acre-feet per year. The assessment continues the parallel used in the Mefford Application by looking at pump test information, aquifer connectivity, and the small amount of theoretical depletion concluding that there would be no net depletion of surface water predicted from the proposed appropriation. The model assumes that all consumed water potentially available for net depletion is all directly removed (depleted) from surface water regardless of the true hydrogeologic environment. In fact, the aquifer test performed in the Mefford Application did not show any connection between ground water extraction in the bedrock aquifer and Hayes Creek. As noted above, the source water for this proposed appropriation is from a confined, fractured crystalline bedrock aquifer. The Bitterroot River and its associated water table aquifer are hosted in quaternary aged alluvium. The interaction between the bedrock aquifers which flank the valley and the alluvial aquifer associated with the Bitterroot River is complex and largely unquantified. Any interaction is expected to be from secondary porosity (joints, fractures, flow along bedding planes) intersection the alluvial sediments, as the primary porosity of the bedrock aquifer is estimated to be near zero. The Applicant states that It is unlikely that the bedrock aquifer in the Hayes Creek drainage is connected to any calculable or predictable degree to the Bitterroot River flow or interacts with the other aquifers in such a fashion that results in a calculable or predictable connection between the proposed withdrawal and surface water in either Hayes Creek or other surface water features within the Potentially Affected Area. The Applicant also reasons that the amount of influence upon surface water resources by indirect means (pre-stream capture) is so small that it is un-measurable, un-calculable, un-predictable and de minimis. (Exhibit A4, A6, Department file)

12. The Applicant provides no evidence of the stream flow regimens of Hayes Creek or the Bitterroot River nor is there any evidence in the file of water administration in Hayes Creek or

1. A Permit for the Mefford well was issued in 2007, 76H-30025195. The Mefford well is permitted for 25 gpm with a maximum volume of 3.80 acre-feet. It is drilled to a depth of 160 feet and the static water level is listed at 17 feet. It is located approximately 150 feet from Hayes Creek and is drilled into the fractured crystalline bedrock aquifer. The Horton (subject) well is drilled to a depth of 120 feet, also into the fractured crystalline bedrock aquifer and is located approximately 830 feet from Hayes Creek.

the Bitterroot River, such as if and when, on average, priority calls are made by senior appropriators

13. Objector's expert opines that the 1.31 acre-feet theoretical potential stream depletion would at sometime appear as a depletion to the Bitterroot River but provided no independent evidence to support that contention. (Hearing Record Track10 @ 14:45)

Physical Availability

14. The proposed diversion is from an existing well with a pump installed which currently supplies water for an existing residence under Provisional Permit 76H-108731. The existing appropriation pumps 20 gpm up to 3.5 acre-feet per year. The instant Application also requests a pumping rate of 20 gallons per minute up to 3.5 acre-feet per year. This is not to say that if approved this well would have a total authorized pumping rate of 40 gpm, but rather the existing pump (capable of pumping 20 gpm) would simply run for a longer period of time, at 20 gpm, resulting in a total volumetric withdrawal from the well of 7 acre-feet (Application Review Form, Exhibit A2)

15. The projected drawdown in the well due to pumping for both the existing Horton appropriation and the proposed appropriation was estimated to be 50.24 feet during the irrigation season of 183 days (the period of greatest use, i.e. 2.5 acre-feet lawn and garden for each appropriation and 0.5 acre-feet domestic (representing one-half of the annual amount) for each appropriation. (Exhibit A4 pp. 10)

16. The well at issue has a static water level of 38 feet and a theoretical maximum pump depth of 110 feet (the well is drilled to a depth of 120 feet) resulting in a water column of approximately 72 feet. Thus after 183 days (the irrigation season requirements) there remains a water column of approximately 22 feet. (Exhibit A4 pp. 10, Exhibit A2 Skergan/Helmer Well Log Report)

17. The aquifer flux is estimated to be 1,147 acre-feet per year based on an aquifer width of 15,550 feet, a transmissivity of 90.75 ft² per day, and a hydraulic gradient of 9.7%. The proposed appropriation seeks approximately 0.3% of the annual aquifer flux. See 16. *infra*. (Exhibit A4 pp. 19)

Legal Availability

18. The Zone of Influence for the proposed appropriation is based on the area in which a drawdown of 0.01 feet may occur. This area was modeled using AquiferWin³² analysis

software. The aquifer characteristics utilized in the drawdown analysis were derived from previous studies in the Hayes Creek Controlled Ground Water Area and approved for use for this appropriation by the Department. The modeled Zone of Influence radius for the proposed appropriation is 8,984 feet. The Zone of Influence partially extends beyond the Hayes Creek drainage into the Deadman Gulch and Bitterroot Flats. However, the aquifer flux calculations are limited to estimating the flux only within the fractured, crystalline bedrock aquifer in which the well is drilled. In other words the aquifer flux calculations do not include the flux in the Zone of Influence which is attributable to the alluvial sediments of the Bitterroot River. Presumably, the Applicant conducts this partial analysis because of the limited connectivity between the crystalline bedrock aquifer into which the well is drilled and the alluvial sediments of the Bitterroot River. The aquifer flux in the zone of influence attributable to the fractured crystalline bedrock is approximately 1147 acre-feet per year. (Exhibit A4)

19. Existing water rights in the Zone of Influence total 505 acre-feet (including both surface and ground water rights).² The proposed appropriation of 3.5 acre-feet per year represents 0.54% of the annual available water in the Zone of Influence analyzed by the Applicant. Water available in the aquifer is greater than the existing demands including Applicant's proposal. In addition, the 1,147 acre-feet of water flux is water which flows through the aquifer every year and does not represent the total amount of water stored in the aquifer – i.e. the total legal demands will not result in a “mining” of the aquifer. (Exhibit A4, Exhibit A3)

Adverse Effect

20. The proposed appropriation will not interfere with the existing appropriation from the same well as demonstrated through the pump test modeling – i.e. the model was run assuming both appropriations were being utilized concurrently and the well was adequate to supply both appropriations. (Exhibit A4 pp. 19-20, Department file)

21. The projected well interference from pumping the proposed appropriation and the existing appropriation from the subject well was calculated to result in a drawdown of 2.2 feet in a well located 150 feet from the subject well (Cronyn well); a drawdown of 0.95 feet in a well located 1,920 feet from the subject well (Garrick well); and a drawdown of 0.92 feet in a well located 2,040 feet from the subject well (Mefford well). (Exhibit A4 pp. 22)

2. Even though the Applicant contends that there is no net depletion to surface water as a result of the proposed appropriation, they include both existing surface water rights and ground water rights for the legal availability analysis even though the statute requires only that they identify all rights in the “source of supply” – in this case the fractured, crystalline bedrock aquifer. The result is a very conservative estimate of the water legally available.

22. The nearest well to the subject well is the Cronyn well at a distance of 150 feet. The Cronyn well is drilled to a depth of 300 feet, had a static water level of 60 feet below ground surface and had the pump installed at a depth of 160 feet (at the time of drilling). The Garrick well, at a distance of 1,920 feet from the subject well, is drilled to a depth of 165 feet, had a static water level of 55 feet with the pump set at 72 feet (at the time of drilling). The Mefford well, at a distance of 2,040 feet from the subject well, is drilled to a depth of 160 feet, had a static water level of 17 feet with the pump set at 150 feet (at the time of drilling). (Exhibit A7, Exhibit A6, Exhibit O-HCHA30)

23. The Cronyn well has a static water column of approximately 240 feet which could see a drawdown of 2.2 feet as a result of this proposal; the Garrick well has a static water column of 110 feet which could see a drawdown of 0.95 feet as a result of this proposal; and the Mefford well has a static water column of 143 feet which could see a drawdown of 0.92 feet. (Exhibit A4)

24. As discussed in 7 – 12, *supra*, the Applicant estimates that there is no net depletion of surface water due to this Application, however, there is an estimated potential net depletion in a closed basin and the surface water connection is unclear.

Adequacy of Appropriation Works

25. The proposed appropriation is through an existing well capable of producing the volume of water requested under this Application. The existing well currently pumps 20 gpm with a total annual volume of 3.5 acre-feet. The Applicant's analysis shows that the existing well can support continued pumping at 20 gpm (for a longer period of time) to supply an additional 3.5 acre-feet of water for a total annual pumped volume of 7 acre-feet. (Exhibit A4)

Beneficial Use

26. Applicant's proposed use of water is a recognized beneficial use of water and falls within the Department's Water Use Standards (ARM 36.12.115(2)(a) and (b)) of 1.0 acre-feet per year for domestic use and 2.5 acre-feet per year for lawn and garden use. (Department file – Application Review Form)

Possessory Interest

27. The proposed use is from an existing well on the Applicant's property for use on the Applicant's property. The Applicant has a well share agreement and well maintenance

agreement with the current holder of a water right from this well (Horton). (Exhibit A4, Exhibit A2)

Water Quality Issues

28. No objections relative to water quality were filed to the Application. (Department file)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in 85-2-311 MCA by a preponderance of the evidence. (85-2-311(1) MCA)

2. A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested, based on an analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §85-2-311 (1) (a) through (h).

3. A proposed appropriation in a basin closure area must include a Hydrogeologic Assessment which includes a prediction "whether the proposed appropriation right will result in

a net depletion of surface water..." 85-2-360(1) MCA. This prediction does not, however, mean that an adverse effect on a prior appropriator will occur. 85-2-360(5) MCA. The determination of adverse effect to a prior appropriator is "a determination that must be made by the department" based on the appropriation right that may be adversely affected. 85-2-360(5) MCA. An Applicant whose Hydrogeologic Assessment predicts a net depletion must offset the net depletion *that results in adverse effect* through a mitigation or aquifer recharge plan. 85-2-362(1) MCA. The Applicant in this matter has complied with the requirements of 85-2-360 MCA and has produced a Hydrogeologic Assessment that the Department's hydrogeologist has deemed to meet the requirements of 85-2-361 MCA, and has predicted that no net depletion of surface water will result from this appropriation, and that in the alternative, if some of the theoretical stream depletion should result in actual stream depletion *that results in adverse effects*, such depletion will be un-calculable and un-predictable and de minimis. No evidence was produced to the contrary other than the opinion of Objector HCHA expert.

Applicant has complied with the requirements of 85-2-360 MCA. (Findings of Fact 7, 8, 9, 10, 11, 12)

4. Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, and in the amount requested. 85-2-311(1)(a)(i) MCA. (Findings of Fact 13, 14, 15, 16)

5. Applicant has proven that water can reasonably be considered legally available. 85-2-311(1)(a)(ii) MCA. (Finding of Fact 17, 18)

6. The applicant bears the affirmative burden of demonstrating the applicable criteria, Mont. Code Ann. 85-2-311(1) are met, including the criterion that prior appropriators under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected.

E.g., In the Matter of Application for Beneficial Water Use Permit No. 25170-g41B by East Bench Grain & Machinery, Inc., DNRC Proposal for Decision, Final Order (1983) (the evidence must support a finding of no adverse effect, and it is applicant's burden to provide it. If he does not, the permit cannot issue). As the Montana Supreme Court recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnes (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be

adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

The Court has likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co. v. Carey (1984), 211 Mont. 91, 97-98, 685 P.2d 336, 340; see also Mont. Const. art. IX §3(1).

Pursuant to Mont. Code Ann. 85-2-311(1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. Applicant has modeled the depletion of the proposed appropriation to surface water and predicts a potential depletion of 1.3 acre-feet. See Montana Trout Unlimited (TU), et al. v. DNRC, et al. 2006 MT 72, 331 Mont. 483, 133 P.3d 224 (recognizing effect of prestream capture on surface water). It is the applicant's burden to produce the required evidence, and not doing so constitutes a failure of proof. *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, Proposal for Decision, adopted by DNRC Final Order (2005); *East Bench, supra*. The proposed appropriation is within the Bitterroot River basin closure, Montana Code Ann. 85-2-344, MCA. The Department cannot assume an impact to a source is so inconsequential and negligible that it can be disregarded in a closed basin. Any depletion of water in a 'closed' basin or any other basin from a new appropriation must be addressed so as to not cause adverse affect to a senior water right holder. E.g., In the Matter of Application for Beneficial Water Use Permit No. 41H-30021840 by the Town of Manhattan, Proposal for Decision (December 2008); *Application for Beneficial Water Use Permit No. 41H 30025398 by Bostwick Properties Inc.*, DNRC Statement of Opinion (2008), *appeal pending Bostwick Properties Inc. v. DNRC*, Case No. DA-08-0248, Supreme Court of Montana.(citing, Alley (2007, Ground Water)); see also *In The Matter Of Application For Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions, LLC.*, DNRC Final Order (December 2007)(permit denied); Proposal for Decision, Final Order (2006), *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 By Utility Solutions LLC* (permits granted requiring mitigation of depletion), *affirmed, Faust v. DNRC et al.*, Cause No. CDV-2006-886, Montana First Judicial District (2008); Final Order (2007), *In the Matter of Application for*

Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC (permit granted requiring mitigation of depletion), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); Statement of Opinion with Conditions accepted by Applicant (2008)(required mitigation for depletion), *Application No.41F-30013630 by Treeline Springs, LLC* ;Final Order (2008), *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 By Utility Solutions LLC* (permit granted with mitigation for depletion), *pending judicial review*, Shennum et al. v. DNRC et al., Cause No. CDV-2008-740, Montana First Judicial District.

Applicant has proven that the water rights of prior *ground water* appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected. “Priority of appropriation does not include the right to prevent changes by later appropriators . . . such as . . . the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise the water right under the changed conditions.” 85-2-401(1). While there will be some drawdown in prior ground water appropriators’ wells as a result of this appropriation, such drawdown is not likely to unreasonably interfere with the exercise of their rights. 85-2-311(1)(b) MCA.

Applicant has not, however, proven by a preponderance of the evidence that the water rights of prior surface water appropriators under existing water rights, certificates, permits or state reservations will not be adversely affected within the Bitterroot River Basin Closure. Where an applicant is required to undertake the permitting process, 85-2-311 MCA does not tolerate a *de minimis* level of adverse effect. The statute requires the applicant to show, by a preponderance of the evidence that “the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected.” The statute does not allow some adverse effect. See, e.g. *In the Matter of Application for Beneficial Water Use Permit No. 43C-30007297 by Dee Deaterly* (DNRC Final Order 2007), *affirmed*, Dee Deaterly v. DNRC, et. al., Cause No. CDV 2007-186 Montana First Judicial District Court (2008), *pending appeal*; Montana Supreme Court Case No. DA-2009-00036; *In The Matter Of Application For Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions, LLC.*, *supra*; *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 By Utility Solutions LLC*, *supra*; *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC*; *supra*; *Application No.41F-30013630 by Treeline Springs, LLC*, *supra*; see also *In the Matter of Beneficial Water Use Permit Application No. 76N-30010429 by Thompson River Lumber Company* , DNRC Proposal for Decision

adopted in Final Order (2006)(calculable depletion is adverse effect). The applicant in this matter has produced a “theoretical potential depletion” of 1.31 acre-feet and then concludes that due to uncertainties in the geologic structure it is “unlikely that the bedrock aquifer in the Hayes Creek drainage is connected to any calculable or predictable degree to the Bitterroot River flow . . .” Indeed, applicant alternatively suggests that “[d]ue to the small and reasonable appropriation requested . . . the influence upon surface water resources by indirect means (pre-stream capture) is so small, that not only is it un-measurable . . . un-calculable and un-predictable, and de minimis.” This Hearing Examiner notes that the record in this matter is devoid of any information as to what the streamflows are in Hayes Creek or the Bitterroot River nor is there any information as to when a “call” is made in Hayes Creek or the Bitterroot River requiring junior appropriators to cease diversions. Such information would be useful in determining the extent and duration of any over appropriation in the affected drainages and whether the instant application would contribute to such over appropriation.

Applicant’s evidence shows that there will be approximately 1.3 acre-feet of depletion (in the form of water being consumed) but fails to adequately account for when or where that depletion will manifest itself. Applicant’s evidence falls short of proving that there will be no adverse affect to surface water users as a result of the proposed appropriation. (Finding of Fact Nos. 11, 12, 20, 21, 22, 23, 24)

7. Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The diversion works already exist and are adequate to support this additional diversion from the works. 85-2-311(1)(c) MCA. (Finding of Fact 24)

8. Applicant has proven that the proposed use of water is a beneficial use. 85-2-102(4) and 85-2-311(1)(d) MCA. “The Department will use the following standards when reviewing notices or applications for new uses of water: (a) for domestic use, for one household, 1.0 acre-foot per year for year-round use; (b) for lawn garden, shrubbery and shelterbelts, 2.5 acre-feet per acre per year.” ARM 36.12.115. Applicant requests use for one household for year-round domestic use up to 1 acre-foot and 1 acre of lawn and garden uses up to 2.5 acre-feet. (Finding of Fact 25)

9. Applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where water is to be put to beneficial use. 85-2-311(e) MCA. (Finding of Fact 21)

10. The Applicant is required to prove water quality criteria only if a valid objection to those criteria is filed. Here, no valid water quality objections were received. 85-2-311(2) MCA.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

ORDER

Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer is **DENIED**.

NOTICE

This final order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 17th day of February, 2009.

/Original signed by David A Vogler/
David A. Vogler, Hearing Examiner
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6835

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 17th day of February, 2009 by first class United States mail.

ROSS D MILLER - ATTORNEY
MILLER LAW OFFICE PLLC
PO BOX 7637
MISSOULA, MT 59807

DONALD D MACINTYRE
ATTORNEY AT LAW
307 N JACKSON
HELENA MT 59601

JOHN J FERGUSON - ATTORNEY
FERGUSON LAW OFFICE PLLC
111 N HIGGINS AVE STE 400
MISSOULA, MT 59801

RICHARD R BULEY – ATTORNEY
TIPP & BULEY ATTORNEYS AT LAW
PO BOX 3778
MISSOULA MT 59806-3778

PATRICIA A & MICHAEL GRAY
PO BOX 727
MISSOULA, MT 59806

GREG WATKISS
7205 DEVONSHIRE LN
MISSOULA, MT 59804

PETER B ODEGARD
7385 BERYL LANE
MISSOULA, MT 59801

Cc:
DNRC, MISSOULA REGIONAL OFFICE
PO BOX 5004
MISSOULA MT 59806-5004

/Original signed by Jamie Price/
Jamie Price, Hearings Assistant
Hearings Unit, (406) 444-6615